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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 837

NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION OF AMERICA, INC. (in behalf of its members),

Petitioner,

—against—

FEDERAL MARITIME COMMISSION and the UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION OF AMERICA, INC. (in behalf of its members),

Petitioner,

—against—

FEDERAL MARITIME COMMISSION and the UNITED STATES OF AMERICA,

Respondents.

No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on October 14, 1964, upholding an order and rule of the Federal Maritime Commission dated April 2, 1963 and promulgating General Order 4, Amendment 1, Subpart B (46 C. F. R. Part 510).

Opinions Below

The opinion of the Court below is printed in Appendix A, hereto, infra pp. 1a-25a and is reported in F. 2d . The report of the Federal Maritime Commission denying petitions for reconsideration of the rule here in issue is printed in Appendix D hereto, infra pp. 1d-8d and is reported in 2 S. R. R. 785.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit upholding a final order of the Federal Maritime Commission was entered on October 14, 1964 and is printed in Appendix B hereto, infra pp. 1b-2b.

The judgment of the Court of Appeals denying a rehearing in banc of petitioner's petition for review of the final order of the Commission was entered on November 12, 1964 and is printed in Appendix C hereto, infra pp. 1c-2c.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented

Did the Federal Maritime Commission exceed its statutory authority when it promulgated Rule 510.23(j)(3) of General Order 4, Amendment 1 (46 CFR § 510.23(j)(3)) which requires that when an ocean freight forwarder provides insurance coverage to a shipper under the forwarder's own open marine insurance policy, the forwarder not only must disclose to the shipper the insured value and the insurance rate charged by the forwarder to the shipper but the forwarder's own premium cost as well?

Statutes and Regulations Involved

The statute involved is the Shipping Act, 1916, 46 U. S. C. §§ 801, 815, 841a, 841b, hereinafter "the Act", and the Administrative Procedure Act, 5 U. S. C. §§ 1031-1042. The regulation involved is the one in issue, 46 CFR §510.23(j)(3). The statutes are printed in Appendix E infra pp. 1e-2e. The rule is printed in Appendix F, infra pp. 1f-2f.

Statement

By order dated April 2, 1963, the Federal Maritime Commission promulgated certain rules which had as their stated purpose "the establishment of standards and criteria to be observed and maintained by licensed independent ocean freight forwarders, ocean freight brokers and oceangoing common carriers in the conduct of their business affairs." A petition to review this order was filed by petitioner in the United States Court of Appeals for the District of Columbia Circuit on May 23, 1963 pursuant to the Administrative Procedure Act, 5 U. S. C. § 1031-1042. On June 13, 1963 the petition was ordered transferred to the Court of Appeals for the Second Circuit pursuant to 28 U. S. C. § 2112(a) for the reason that a petition putting in issue the same order of the Commission had been filed earlier in that Circuit. All petitions to review this order were consolidated by the Court on July 22, 1963.

After a stay of the proceedings, at the request of the Federal Maritime Commission, the Court of Appeals heard argument and on October 14, 1964 handed down an opinion and order affirming the Commission. Petitions to rehear in banc were denied by the Court on November 12, 1964.

The rule with which we are concerned here applies to freight forwarders and is the so-called "insurance rule", Section 510.23(j)(3). The rule requires that when a forwarder places insurance on a shipment, using his own open policy of marine insurance (which he has negotiated and arranged with an underwriter), the forwarder must disclose on his invoice to the shipper, the forwarder's own premium cost, as well as the insurance rate which he charges the shipper and the insured value of the shipment. This petition is directed solely to the validity of this disclosure requirement of the insurance rule.

REASONS FOR GRANTING THE WRIT

IN UPHOLDING THE VALIDITY OF 46 CFR § 510.23(j)(3) THE DECISION OF THE COURT BELOW (THE FIRST JUDICIAL INTERPRETATION OF THE FREIGHT FORWARDER LAW OF 1961) IS AN UNREASONABLE DEPARTURE FROM RELEVANT ESTABLISHED EVIDENTIAL STANDARDS OF THE ADMINISTRATIVE PROCEDURE ACT AND THE SHIPPING ACT, 1916 AND IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

POINT I

The Findings Of Fact Below Are Legally Insufficient to Support The Rule That Is Based Thereon.

In upholding the order and rule of the Federal Maritime Commission, the Court below found that the Commission had proved various violations of Section 16 First of the Shipping Act, 1916, 46 USC § 815 and that the contested rule was supportable as being "reasonable and necessary to prevent discriminatory practices violative of Section 16 (First)". The applicable provisions of Section 16 First are as follows:

> "That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:
>
> First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

It is submitted that this finding by the Court of Appeals is not supported by the record made below by the Commission.

Although the Federal Maritime Commission as a governmental administrative agency possessing "administrative expertise" is granted broad discretion in promulgating rules designed to regulate activities that come within its jurisdiction, this decretion is not without limits. The Administrative Procedure Act, § 10(e), 5 U.S.C. § 1009(e)(5) imposes upon administrative agencies the requirement that their "actions, findings and conclusions" be supported by "substantial evidence".

The only evidential findings of the Federal Maritime Commission that are of record in this proceeding are those contained in the Commission's report in Docket 765, 6 F.M.B. 327, (FMB 1961), a proceeding separate and apart from the present which was concluded before enactment of the 1961 amendments to Sections 43 and 44 of the Shipping Act, which amendments are considered by the Commission to be the statutory authority for the rule (App. F. p. 1f).

The report in Docket 765 determined that certain forwarders charged different insurance markups to different shippers, but there was no finding that these shippers were similarly situated, i.e. were shippers with identical loss records who were shipping the same commodities to the same place, and such a finding could not be supported by the record. Petitioner submits that without such a finding, Section 16 First cannot be violated and therefore the decision of the Court of Appeals, based on the inadequate findings of Docket 765, should be reversed.

Heretofore, the Commission has defined discrimination against shippers, under Section 16 of the Act, in terms of a competitive relationship. In *West Indies Fruit Co.* v. *Flota Mercante*, 7 F.M.C. 66, 69, 70 (FMC 1962) the Commission set forth the elements of discrimination as follows:

"The manifest purpose of the Sections, 16 and 17, is to require common carriers subject to the Act to accord like treatment to all shippers who apply for and receive the same service. American Tobacco Co. v. Compagnie Generale Transatlantique, 1 USSB 53, 56 (1923). Prejudice to one shipper to be unjust must ordinarily be such that it constitutes a source of positive advantage to another. Philadelphia Ocean Traffic Bureau v. the Export S. S. Corp., 1 USSB 538 (1936). *There must be at least two interests involved in any case of preference, prejudice or discrimination, and it is essential that there be established an existing and effective competitive relationship between the two interests.* Huber Mfg. Co. v. N. V. Stoomvart Maatschappij "Nederland", 4 FMB 343 (1953), American Peanut Corp. v. M. & M. T. Co., 1 USSB 78 (1925), Boston Wool Trade Assn. v. M. & M. T. Co., 1 USSB 24 (1921), Eagle-Ottawa Leather Co. v. Goodrich Transit Co., 1 USSB 101 (1926). This competitive relationship is necessary not only to show the extent to which the complaining shipper was damaged by the alleged preference, prejudice or discrimination; its establishment is also necessary to prove the violation itself. American Peanut Corp. v. M. & M. T. Co., Supra; Boston Wool Trade Assn. v. M. & M. T. Co., Supra. Complainants have confused proof of the competitive relationship itself with proof of the character, intensity and effect of that relationship. *In order to prove a violation of Sections 16 and 17, it is necessary to first establish the competitive relationship itself.* Proof of the character, intensity and effect of the competitive relationship is necessary to prove the amount of damages and sustain an award of reparations. . . ." (emphasis added)

As recently as 1963 the Commission has categorically stated that "there can be no unjust discrimination against a shipper under the Shipping Act unless another similarly situated shipper with whom the complaining shipper competes is preferred", *Agreement 8765—Gulf/Mediterranean Trade,* 7 F. M. C. 495, 500 (1963). Although *Agreement 8765* dealt with the approvability of a rate setting agreement under Section 15, the statement by the Commission of what it considers requisite for a finding of discrimination is relevant here where the justification asserted in support of a rule is that it eliminates a practice that violates the Shipping Act because the practice is discriminatory against shippers.

Without any more facts in the record than are present here it is impossible intelligently to apply either the statute or decisions interpreting the statute. The only known facts are that different shippers were charged different amounts for insurance coverage; there is nothing in the record to show that these shippers were similarly situated as the decisions require. The impossibility of drawing, from these facts, any valid conclusions as to violations of the Shipping Act seems self-apparent.

POINT II

The Court Below Erred in Refusing to Follow the Criteria, Established by Prior Decisions, for Determining Violations of Section 16 First of the Act.

The Court below in affirming the Commission's findings of discrimination rejected the prior decisions as not applicable and without citing any authority therefore determined that

> "The very practice of charging shippers disguised markups of widely varying amounts on substantially identical services, without justification, seems to us

> to be prima facie discriminatory in a regulated industry. In any event, we do not believe competitive relationships must be shown to justify the prophylactic disclosure technique of Rule 510.23(j)." App. A, p. 20a

The finding by the lower court that the case law that has been developed under Section 16 First of the Act does not apply to the Freight Forwarding industry is based on the determination that unlike those situations where wharfage and transportation are furnished, the commodity involved has "little or nothing to do with the reasonableness of the fee exacted" by the forwarder for services relating to the commodity. (App. A, pp. 19a, 20a) However, the test that has been applied to wharfage and transportation practices, where discrimination in charges is alleged, is not based on any relationship between the service that is provided and the charge made therefore, but rather upon a relationship between shippers. The appropriate test is whether there are two shippers in similar circumstances and one of the shippers is preferred to the other (by a lower rate or otherwise) and this preference to one shipper is the proximate cause of injury to the other, *West Indies Fruit Co.* v. *Flota Mercante, supra.*

The Court of Appeals found in effect that it is prima facie illegal for a forwarder to make different charges to different shippers regardless of any difference in circumstances, regardless of whether the shippers are competitors, and regardless of whether there is any cause and effect relationship between the two different charges. This has never been the law—the lower court cites no cases in support of it—and it is contended that before it becomes the law there should be a clear showing of necessity for making it so, something more than a simple restatement of the Commission finding of statutory violation (concurred in by the

Court of Appeals without logical explanation or legal citation).

Neither the report of the Commission nor the opinion of the Court of Appeals determines the manner in which insurance billing practices of the forwarders give "any undue or unreasonable preference or advantage" or "subject any person to any undue or unreasonable prejudice or disadvantage", which are the words of the statute and thus the required standards to determine illegality under Section 16 First of the Act. In refusing to examine the contested rule in terms of the proper evidential standards the Court below committed error that should be remedied by this Court.

POINT III

The Proposed Rule, In Requiring Disclosure Of A Cost Item in An Arm's Length Transaction, Is Unreasonable, And Therefore, Invalid, Not Only For The Reason That There Is No Authority For Such Disclosure, But, Also Because There Is No Demonstrable Purpose That The Proposed Rule Serves.

A shipper who requests a freight forwarder to cover his shipment on the forwarder's open insurance policy is aware of the fact that he is buying this insurance from the forwarder and that the forwarder is not merely placing the insurance with an underwriter. A shipper seeks coverage from a freight forwarder because it is to his advantage to do so. This was acknowledged by the Commission in its opinion in Docket 765, 6 FMB 327, 341 wherein it made the following statement:

> "Because of their volume of shipments, forwarders, under their own open policies are sometimes able to obtain insurance at lower costs, including the markups, to the shippers than could be obtained by

> the shippers themselves. In instances where shippers maintain their own marine insurance policies, they sometimes request the forwarders to place insurance under the forwarders' policies when the claim experience on particular types of shipments or to particular areas is unfavorable, in order to protect the loss ratio under the shippers' own policies which bears on the premium rates."

The freight forwarder offers this service to a highly sophisticated specialized group, the shippers, but it is essentially much the same as any service that is offered to the general public. Although there are many laws, such as the Federal Trade Commission Act, guaranteeing to the consumer his unquestioned right to know what he is buying and how much he is actually paying for it (a right which petitioner concedes), this is the first time to petitioner's knowledge, that a government agency has construed a statute as authorizing the forced disclosure of a vendor's *costs and gross profit.*

Furthermore, the Federal Maritime Commission's position as to the freight rates charged shippers is diametrically opposed to the position it has taken here, for a carrier would be held to be discriminating if it took its cost factor into account and charged more for cargo loaded by the stevedore on overtime than for cargo loaded during straight time. It is clearly not a forwarder's cost which could bring about discrimination; it is, if anything, the rate charged the shipper, and this rate we do not object to disclosing.

Thus, since there has been no demonstration by the Commission or the lower court as to how disclosure of a forwarder's cost (for the insurance sold) could bear on whether or not a shipper was unfairly discriminated against, the rule is not only unreasonable and unlawful under the Admini-

strative Procedure Act and the Shipping Act, but it is useless as well and should be set aside.

POINT IV

The Opinion of the Court Below Is In Conflict With Relevant Decisions of This Court.

This Court has had occasion to determine what is discriminatory under Section 16 of the Shipping Act. In *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297 (1936) the Court upheld a United States Shipping Board Bureau finding of *prima facie* discrimination based upon evidence that the respondent charged shippers different rates on the same commodities by use of what is now called the dual rate system and which is now legal by statute. It is concededly reasonable to assume that, *prima facie,* shippers of the same commodities on the same vessel are competitors and that an advantage given to one is a comparable competitive disadvantage to the other. In *California* v. *United States,* 320 U. S. 577 (1944) this Court upheld a finding by the United States Maritime Commission, that the allowing of excessive free storage and the charging of non-remunerative rates for storage were violations of Section 16 and 17 of the Act where the burden of meeting the cost of this storage service would be shifted to those who paid for other terminal services but did not or could not take advantage of wharf storage. Thus in *California* v. *United States* there was a clear finding of an advantage to one shipper resulting in a disadvantage to another i.e. that Shipper X had free storage because Shipper Y paid for it. In the present proceeding there is no finding of any relationship between the diverse charges made to diverse shippers, nor any finding of a relationship between the shippers themselves; neither is there a finding that any partciular

charge for providing open policy coverage was non-compensatory nor a finding that one shipper paid less because another paid more.

Under the cases interpreting the statute here controlling, "discrimination" has much more than the skeletal meaning of "a distinction" and that the Commission has to put some meat on the bare bones. A simple statement that a procedure is "prima facie discriminatory" is not equivalent to a finding that Section 16 First has been violated, for this statute makes unlawful only those acts of discrimination that result in an "undue and unreasonable" "preference and advantage" or "prejudice and disadvantage". Without something more than the simple fact of different charges to different shippers there can be no violation of the statute to support the insurance rule, and the rule must fall as unreasonable. This limiting principal was explicitly set forth by this Court in *Federal Communications Commission* v. *American Broadcasting Co.,* 347 U. S. 284 (1954), which dealt with an attempt by the Federal Communications Commission to issue a rule forbidding certain activity. Under a Section of the Communications Act of 1934, the Communications Commission tried to prohibit by rule certain give-away programs which the agency decided were in violation of the Act. In setting aside the rule this court pointed out a limit to the Commission's rule making powers;

> "But the Commission's power in this respect is limited by the scope of the statute. Unless the 'give-away' programs here are illegal under § 1304, the Commission cannot employ the statute to make them so by agency action."

Therefore, since the billing practices of freight forwarders in the open marine policy insurance situation have

not been proven to be in violation of Section 16 First of the Shipping Act, "the Commissoin cannot employ the statute to make them so by agency action," and the Court of Appeals' decision upholding the Commission, being squarely in conflict with the foregoing decisions of this Court, must be set aside.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Dated: New York, N. Y., January 15, 1965.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 34, 35, 36—September Term, 1964.

(Argued September 23, 1964 Decided October 14, 1964.)

Docket Nos. 28229, 28306, 28307

NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC., INGE AND COMPANY, INC., BARR SHIPPING COMPANY, INC., MAJOR FORWARDING COMPANY, INC., and JOHN H. FAUNCE, INC.,

Petitioners,

—v.—

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents,

PHILADELPHIA FREIGHT BROKERS, FORWARDERS AND CUSTOM BROKERS ASSOCIATION, INC., BALTIMORE CUSTOM HOUSE BROKERS AND FORWARDERS ASSOCIATION, FOREIGN COMMERCE CLUB OF BOSTON, INC., and EXPORT AND IMPORT FORWARDING ASSOCIATION OF VIRGINIA,

Interveners.

Opinion of the United States Court of Appeals

NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION OF AMERICA, INC.,
Petitioner,

—v.—

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents.

FARRELL SHIPPING CO., INC.; FARRELL BROS. BROKERAGE, INC.,
Petitioners,

—v.—

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents.

Before:

MOORE, SMITH and KAUFMAN,
Circuit Judges.

Consolidated petitions for review of order of the Federal Maritime Commission. Petitioners challenge the validity of six regulations implementing the Freight Forwarder Law of 1961.

Order affirmed.

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KAUFMAN, *Circuit Judge*:

In these consolidated appeals ocean freight forwarders, individually and through trade associations,[1] question the validity of six regulations issued by the Federal Maritime Commission. The regulations, which implement the Freight Forwarder Law of 1961, 75 Stat. 522, 46 U. S. C. §§ 801, 841a, 841b, generally concern "brokerage" payments from

[1] The regulations are challenged by the New York Foreign Freight Forwarders and Brokers Association, Inc., National Customs Brokers & Forwarders Association of America, Inc., Inge and Company, Inc., Barr Shipping Company, Inc., Major Forwarding Company, Inc., John H. Faunce, Inc., Farrell Shipping Co., Inc., and Farrell Bros. Brokerage, Inc. The New York Association is composed of approximately 110 ocean freight forwarders conducting their business primarily through the Port of New York. The members also do a substantial business in the other major ports of the United States, either through branch offices or corresponding forwarders. National Customs Brokers is a membership corporation with some 350 members located throughout the United States and some 200 members abroad.

ocean carriers to forwarders and the forwarders' methods of billing shippers.

Our discussion of the regulations will be clearer if the duties of a forwarder are first brought into focus. Most American exporters use the services of ocean freight forwarders who, in essence, act as export departments for their shipper clients. An exporter who ships goods abroad customarily consigns the merchandise to a forwarder who then makes all arrangements for dispatch to a foreign port. Thus, the forwarder will secure cargo space with a steamship company, give advice on governmental licensing requirements, proper port of exit and letter of credit intricacies, and arrange to have the cargo reach seaboard in time to meet the designated vessel. The forwarder also prepares required shipping documents, including the dock receipt, delivery order, bill of lading, export declaration and the consular invoice required on shipments to certain countries.

Often the forwarder performs so-called accessorial services, such as arranging insurance either under his own policy or the exporter's open marine policy. He may provide for local trucking of less than carload parcels to the pier and occasionally he will store partial shipments. To reimburse himself for the cost of arranging these accessorial services the forwarder charges the shipper a fee greater than his actual disbursement.

Most forwarders receive their revenues from two sources. They are paid by shippers for the various forwarding services performed and on many shipments forwarders receive, in addition, brokerage payments from ocean carriers.

Despite the forwarders' valuable role in relieving exporters of the many details and formalities of foreign trade and facilitating the flow of water-borne commerce, certain activities within the industry have been scrutinized by public agencies and found objectionable. Criticism has focused

primarily on the forwarders' activities as brokers and the payments received for such brokers' services from ocean carriers as well as the forwarders' methods of billing shippers.

The history of public investigation begins in 1942 when the Maritime Commission instituted a probe, under the 1916 Shipping Act, 39 Stat. 728, 46 U. S. C. § 801, into the propriety of forwarder practices at the Port of New York. The proceedings were temporarily sidetracked when the forwarders challenged the agency's statutory authority to regulate their industry's activities. The Maritime Commission's jurisdiction was upheld in *United States* v. *American Union Transport, Inc.*, 327 U. S. 437 (1946), when the Supreme Court concluded that foreign freight forwarders, even though not contractually or corporately affiliated with a common carrier by water, are subject to the Shipping Act's regulatory provisions.

The Court pointed out that forwarders are "agents of the shipper," intimately related to both shipper and carrier as a "go-between," and that "considerations of policy and history" called for their inclusion within the regulatory scheme. 327 U. S. at 443, 445, 450. In Mr. Justice Rutledge's words:

> Section 16 forbids various forms of discrimination, as well as other practices, on the part of any common carrier by water "or other person," which an independent forwarder readily may commit or induce . . . [S]ome of the practices forbidden appear to be peculiarly if not exclusively susceptible of commission or inducement by forwarders, brokers and shippers' agents, all specifically mentioned in the section.
>
> The purpose of § 17, in relevant part, is to provide for the establishment, observance and enforcement of just and reasonable regulations and practices relating to or in connection with the receiving, han-

> dling, storing or delivering of property. By the nature of their business, independent forwarders are intimately connected with these various activities. Here again, unless the Commission has jurisdiction over them, it may not be able effectively to carry out the policy of the Act. 327 U. S. at 447-49.

After the Supreme Court's decision the Maritime Commission completed its investigation, *Port of New York Freight Forwarder Investigation,* 3 U. S. M. C. 157 (1949), and on May 18, 1950, issued regulations governing forwarder billing practices, special contracts between forwarders and shippers or consignees, and brokerage payments. 46 C. F. R. Part 244. In 1954 the agency began a second broad study of the forwarding industry. Some seven years later, on June 29, 1961, a comprehensive report was published, together with regulations to become effective after 120 days. *Investigation of Practices, Operations, Actions, and Agreements of Ocean Freight Forwarders,* 6 F. M. B. 327.

In the course of these extensive probes the maritime agency uncovered certain disturbing improprieties in forwarder billing methods; charges for accessorial services, for example, were marked up "in a random fashion." The 1961 report concluded that "discrimination, preference, and prejudice is the rule" in the assessment of forwarder charges and is unlawful absent justification. Accordingly, the 1950 regulations were modified "to prohibit the assessment of disguised markups in all instances which are shown on this record to result in violation of sections 16 and 17 of the Act." 6 F. M. B. at 359, 365.

The agency also investigated and analyzed brokerage payments from carriers to forwarders. After pointing out that forwarders are engaged by shippers to carry out shipper responsibilities, the Commission held that forwarders are generally not brokers in their relations with

carriers. Nevertheless, according to the study, the carriers paid brokerage fees without ascertaining whether the forwarders had performed any services and without determining if forwarder-shipper relationships would make the payments illegal rebates under section 16. Having concluded that brokerage fees led forwarders to discriminate among shippers in violation of sections 16 and 17 of the Shipping Act, the agency resolved to prohibit brokerage payments covering cargo with respect to which forwarding services had been rendered.

Reaction from the freight forwarding industry followed swiftly and took the form of efforts to secure Congressional legislation which came to fruition in the Freight Forwarder Law, enacted September 19, 1961. 75 Stat. 522, 46 U. S. C. §§ 801, 841a, 841b. Congress' remedy for the industry's malpractices stopped short of the agency's proposed total ban on brokerage payments. Instead, compensation from carriers was authorized only where the forwarder renders specified services of value and issues a certificate to that effect. Additionally, forwarders would be licensed and other safeguards provided to enable the Maritime Commission to cure the abuses and undesirable practices uncovered in its extensive investigations.

Under the 1961 Law a common carrier may "compensate" a licensed forwarder "when, and only when" he has performed—and certifies to the carrier that he has performed—"the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging space for, such cargo" plus at least two out of five additional enumerated services. 46 U. S. C. § 841b(e). Moreover, a license is now required as a prerequisite to engaging in the forwarding business. 41 U. S. C. § 841b(a). A forwarder licensee must be "independent"—free of any affiliation with a shipper, consignee, seller, purchaser of the shipment, or with any person having a beneficial interest in the goods, 46 U. S. C. § 801—in order to eliminate in-

direct rebates to shippers. Finally, the Maritime Commission is directed to prescribe "reasonable rules and regulations" to be observed by forwarders. 46 U. S. C. § 841a.

The Commission heeded this mandate and commenced a new rule-making proceeding. In December 1961 the agency issued regulations, without objection from the forwarders, setting forth the procedure for obtaining a forwarder's license. Shortly thereafter, in February 1962, proposed rules regulating the "Practices of Independent Ocean Freight Forwarders, Ocean Freight Brokers, and Oceangoing Common Carriers" were published. After reviewing the comments of interested parties, the Commission revised some of the proposed rules and republished them in January 1963. Further comments were received and the Commission heard oral arguments respecting those rules challenged by the forwarding industry. Finally, by order dated April 2, 1963, published in the Federal Register of May 1, 1963, 28 Fed. Reg. 4300, Maritime Commission gave notice that, after further revision, the proposed rules had been adopted and would become effective June 1, 1963. On May 21, 1963, the Commission denied petitions by freight forwarders to reconsider certain of the adopted rules.

Having exhausted their administrative remedies, the aggrieved freight forwarders filed petitions with this Court and the Court of Appeals for the District of Columbia Circuit seeking judicial review of six of the proposed regulations. On May 28, 1963, we issued an interlocutory injunction restraining the Commission from putting into effect the challenged rules until thirty days after the determination of this appeal. The District of Columbia proceedings have been transferred to this Court pursuant to 28 U. S. C. § 2112(a), and the several cases have been consolidated. Our jurisdiction derives from the Administrative Procedure Act, 64 Stat. 1129 (1950), 5 U. S. C. §§ 1031-42 (1958).

The six challenged regulations may be briefly summarized: (A) Section 510.21(l) defines "any lien interest" therein. (B) Section 510.22(a) prohibits a forwarder from collecting compensation from a carrier where the carrier performs part of the forwarding services. (C) Section 510.23(j) requires a forwarder to itemize or state separately on his bill his actual expenditures on the shipper's behalf as well as the charges or fees assessed for his own services. (D) Section 510.24(e) requires the forwarder to certify to the carrier, as to each shipment, which of the services specified in Section 44(e) of the 1964 Law he has performed. (E) Section 510.24(g) prohibits a licensed forwarder, and any person or firm in which he has a beneficial interest, from charging or collecting "any compensation or brokerage" from a carrier with respect to non-bulk cargo, unless the forwarder has performed the minimum services specified in Section 44(e). (F) Section 510.25(a) provides that forwarders, upon reasonable request, must disclose to Maritime Commission personnel or bona fide shippers, special contracts or arrangements with shippers.[2]

I.

Orderly procedure requires that we first define this court's limits in adjudicating the validity of the challenged

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[2] The challenged regulations appear in full at 28 Fed. Reg. 4300 (1963).

The New York Association objects to all of the rules except Section 510.24(g). Farrell Shipping and Farrell Bros. Brokerage objects only to 510.24(g). National Customs Brokers contests only Section 510.23(j).

On September 4, 1963, we granted leave to intervene to Philadelphia Freight Brokers, Forwarders and Custom Brokers Association, Inc., Baltimore Custom House Brokers and Forwarders Association, Foreign Commerce Club of Boston, Inc., and Export and Import Forwarding Association of Virginia. The interveners represent the majority of persons and businesses engaged in freight forwarding in the ports of Boston, Philadelphia, Baltimore, and Norfolk-Newport News. The interveners have urged that we uphold Rule 510.22(a).

regulations. In doing so we should consider the contentions respecting our scope of review. The New York Association maintains that the Maritime Commission's rule-making authority is limited to correcting practices found to violate the regulatory provisions of the 1916 Shipping Act. If, according to this view, a practice sought to be regulated is not contrary to a substantive provision of the 1916 Act, then, it is urged, the regulation is invalid. We do not agree with this restrictive view of the agency's powers.

Judge Frank capsulized the standards that govern our review in *United States* v. *Obermeier,* 186 F. 2d 243 (2d Cir. 1950), *cert. denied,* 340 U. S. 951 (1951). He wrote that "(1) A regulation is presumptively valid, and one who attacks it has the burden of showing its invalidity. (2) A regulation or administrative practice is ordinarily valid unless it is (a) unreasonable or inappropriate or (b) plainly inconsistent with the statute." See also *Grace Line, Inc.* v. *Federal Maritime Board,* 263 F. 2d 709, 711 (2d Cir. 1959). Michael Obermeier had been convicted for knowingly making a false statement under oath in an administrative, pre-naturalization-petition examination. He claimed that he committed no crime because the oath was administered without explicit statutory authority. The court rejected this view, holding that the regulations, which went beyond the Naturalization Act in authorizing an oath in examinations held before filing a petition for naturalization, were "eminently reasonable and appropriate." 186 F. 2d at 248. The Administrative Procedure Act, § 10(e), 5 U. S. C. § 1009, articulates the test in this fashion: agency rules may not be arbitrary, capricious or an abuse of discretion or unsupported by substantial evidence.

Our limited scope of review, established by judicial decisions and the A. P. A., is based on a realistic view of the legislative process. Congressional legislation does not

undertake to deal with every specific evil for some are unforeseeable; instead Congress often creates an administrative agency to allow application of expert's familiarity with the problems involved. The Supreme Court carefully explained the necessary and proper function of agency rule-making in *American Trucking Ass'ns, Inc.* v. *United States,* 344 U. S. 298 (1953). The Interstate Commerce Commission had issued rules prohibiting short-term or trip-leasing by motor carriers. The Court held that promulgation of the rules was within the Commission's power, despite the absence of specific reference to leasing practices in the Motor Carrier Act. Mr. Justice Reed's words deserve quotation:

> All urge upon us the fact that nowhere in the Act is there an express delegation of power to control, regulate or affect leasing practices, and it is further insisted that in each separate provision of the Act granting regulatory authority there is no direct implication of such power. Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellant's contentions if we thought it a reasonable canon of interpretation that the draftsman of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 219-220; *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 193-194. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to

> their work the expert's familiarity with industry conditions which members of the delegating legislature cannot be expected to possess. *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612. [344 U. S. 298, 309-10.]

The New York Association also suggests that the rules do not contain "a concise general statement of their basis and purpose" in compliance with Section 4(b) of the Administrative Procedure Act, 5 U. S. C. § 1003(b). But the order promulgating the rules meets the statutory requirement in stating that they implement the 1961 Law "and have for their purpose the establishment of standards and criteria to be observed and maintained by licensed independent ocean freight forwarders, ocean freight brokers and oceangoing common carriers in the conduct of their business affairs."

Finally, we cannot ignore the Maritime Commission's responsibility to enforce the overall objectives of the 1916 Shipping Act. Mr. Justice Frankfurter defined the broad scope of this obligation in *State of California* v. *United States*: "Finding a wrong which it is duty-bound to remedy the Maritime Commission, as the expert body established by Congress for safeguading this specialized aspect of the national interest, may, within the general framework of the Shipping Act, fashion the tools for so doing." 320 U. S. 577, 584 (1944). The same thought was expressed more recently:

> The great complexity of our economy induced Congress to place the regulation of businesses like foreign shipments in specialized agencies with broad powers. The courts are slow to interfere with the conclusions of such agenices when reconcilable with statutory directions. *American Union Transport, Inc.* v. *United States*, 257 F. 2d 607, 612 (D. C. Cir.), *cert. denied*, 358 U. S. 828 (1958).

II.

With this background we now consider whether the six challenged regulations are reasonable and consistent with the authority granted in the 1916 Shipping Act and the 1961 Freight Forwarder Law.

A. *Section 510.21(l)*

Section 1 of the 1916 Shipping Act, as amended by the Freight Forwarder Law of 1961, defines an "independent ocean freight forwarder" as "a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest." 46 U. S. § 801. Licensed forwarders must be truly independent of shippers and not have any beneficial interest in shipments in order to prevent the illegal rebating that occurs when brokerage is received by forwarders who are also shippers, shipper-owned or shipper-connected or who have a beneficial interest in shipments. To fulfill this objective Rule 510.21(l) defines "beneficial interest" to include "any lien interest" of a forwarder "arising by the financing of the shipment."

The New York Association argues that the rule is unlawful because it seeks to regulate forwarder financing activities which do not violate any provision of the Shipping Act. But Congress by its legislation in 1961 rejected this contention, and showed a clear intention to separate forwarders completely from all shipper interests. Legislation proposed by the forwarder industry sought to define "beneficial interest" to exclude a lien interest. However, the phrase "other than a lien," urged upon Congress by the forwarders, was deleted from the words "beneficial interest

therein other than a lien" submitted by them. Congress apparently accepted the agency's position that "a lien on a shipment could give a freight forwarder sufficient beneficial interest in the shipment to cause payments thereon by the carrier to the forwarder to be a form of indirect rebate of the freight." Senate Report No. 691, 87th Cong., 1st Sess., p. 4. We are not convinced that this legislative history should be ignored simply because of the suggestion that the urgent need for new legislation led the industry to accept the change without objection.

It is interesting that the rule also provides that "any obligation arising in favor of a licensee by reason of advances of out-of-pocket expenses incurred in dispatching of shipments shall not be deemed a beneficial interest." We find the distinction thus drawn between a lien arising from financing and one created by a forwarder's out-of-pocket expenses eminently reasonable. The forwarder routinely incurs out-of-pocket expenses in carrying out his functions for the shipper; he is usually reimbursed soon after the goods reach their destination. Indeed, the 1961 Law expressly lists "payment of the ocean freight charges" as a function a freight forwarder may perform and a basis for his receipt of compensation. 46 U. S. C. § 841b(e)(5). On the other hand, the financing of export shipments belongs primarily to the exporter or a financial institution, not to the independent ocean freight forwarder.

Although the challenged rule may limit some benign financing activities by forwarders, it provides a means to curb an evil Congress sought to correct—the collection of compensation from carriers by persons who have any interest in the goods being shipped. We hold that the rule is reasonable and necessary to prevent forwarders from selling goods under the guise of "financing" and then using this subterfuge to receive a discounted freight rate.

B. *Section 510.22(a)*

The contested portion of this rule provides that "No licensee may charge or collect compensation in the event he requests the carrier or its agent to perform any of the forwarding services set forth in * * * [section 44 of the 1961 Law] unless no other licensee is willing and able to perform such services." The Maritime Commission thereby seeks to prohibit a forwarder from collecting compensation from a carrier if the carrier, at the forwarder's request, has performed part of the freight forwarding service.[3]

The New York Association urges that the rule is contrary to the 1961 Law because it may deprive a forwarder of compensation even though he has rendered sufficient services under section 4(e). The forwarders direct our attention to the absence of specific statutory language prohibiting the rendering of free services by carriers in addition to the payment of brokerage. But this narrow approach ignores the Commission's responsibility to enforce the broad objectives of the Shipping Act of 1916.

We find Section 510.22(a) reasonable and necessary to prevent the erosion of the freight forwarder industry at ports other than New York. The rule seeks to prevent forwarders in the larger ports, pro control cargo routing, from bypassing forwarders in the lesser ports. The development and free flow of this nation's foreign commerce requires that local freight forwarders be available at all ports; achievement of that goal will be frustrated if carriers or their agents perform services at the lesser ports for forwarders located in New York.

The forwarding industry's history fully supports this conclusion. Absent the challenged regulation, the New York

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[3] In denying the forwarders' petitions for reconsideration of the rule the Commission declared that § 510.22(a) "will not be interpreted to require that a carrier deny compensation where a forwarder requests but the carrier does not render the services requested."

forwarders, because of their power to control cargo routing, can and do manipulate freight to the lesser ports in order to have the carriers perform services, without charge, normally executed by a forwarder. This practice deprives the lesser-port forwarders of fees, at the same time there is no reciprocity for these forwarders in New York. In its 1961 report the maritime agency wrote that:

> In order to avoid, where possible, the necessity of splitting brokerage payments, the New York forwarders have * * * entered into arrangements with the ocean carriers under which the work necessary to complete forwarding services * * * is accomplished by the ocean carriers without charge at ports such as Boston and Baltimore, and * * * Charleston and Savannah. Pursuant to these arrangements, the New York forwarders have diverted cargo from New Orleans to Savannah and Charleston in order to avoid the splitting of brokerage with New Orleans forwarders, because carriers have refused to perform outport forwarding services * * * at New Orleans. The forwarders at Boston and Baltimore have requested that the carriers discontinue their performance of free forwarding services for the New York forwarders, or alternatively that like services be performed at New York on behalf of the Boston and Baltimore forwarders, but these requests have been refused. 6 F. M. B. 327, 345.

In this connection we note that the New York forwarders' approximately sixty percent share of the shipments handled by the industry, 6 F. M. C. 327, 337 (1961) seems grossly disproportionate when compared with the fact that export tonnage passing through New York in 1961 was only twenty percent of the combined export tonnage of Boston, Philadelphia, Baltimore, and Norfolk-Newport News. 1963 Statistical Abstract of the United States, p. 600.

The challenged rule represents a reasonable effort by the Maritime Commission to fulfill its affirmative duty to implement the national maritime policy. Section 44(b) of the Shipping Act, 46 U. S. C. § 841(b), establishing the licensing requirement for freight forwarders, requires "that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936."[4] We recognize the importance of the ocean freight forwarding industry to the American economy; without the industry's services, our vital export trade would be at a serious disadvantage in the intense competition of world commerce. It is equally important that the forwarding industry flourish at the lesser ports to insure maximum utilization of all shipping routes to our trading associates in all corners of the world. Rule 510.22 (a) is reasonable and necessary to prevent the New York forwarders from using their position of power to stifle forwarders at Boston, Philadelphia, Baltimore and Norfolk.

C. *Section 510.23(j)*

In substance, this rule requires a licensed forwarder to itemize or state separately in billing exporters the actual expenditures made on the shipper's behalf as well as the fees assessed for his own services. Traditionally, the invoices of New York forwarders showed as one item the total charge for accessorial services such as procuring insurance, warehousing or cartage. This charge included the forwarder's costs as well as his fee for arranging the service. The Maritime Commission believes that the proposed rule is necessary to prevent freight forwarders from using

[4] The 1936 Act declares, "It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine . . . to provide shipping service on all routes essential for maintaining the flow of . . . domestic and foreign water-borne commerce at all times." 46 U. S. C. § 1101.

these billing methods to mark up insurance and accessorial charges indiscriminately.

The forwarders suggest that the rule will cause them to lose the gross profit customarily received in arranging for accessorial services, a loss they claim will seriously affect the profitability of their operations. They argue that the practice of including the disbursement and service fee as one item on the invoice to the shipper does not violate either Section 16 or Section 17 of the Shipping Act. Section 16 (First), 46 U. S. C. § 815, makes it unlawful for any forwarder to give an undue or unreasonable preference or advantage to one person or to subject a person to any undue or unreasonable prejudice or disadvantage. We agree with the Commission that substantial evidence before it indicated the traditional billing methods lead to discriminatory practices outlawed by Section 16 (First); we therefore find it unnecessary to consider whether Section 510.23 (j) is necessary to eliminate purported violations of Section 17.

It is true, as the New York Association argues, that there is no discrimination in the sense that some shippers are billed differently, for all bills treat the disbursement and service fee as one item. But this very method permits forwarders to discriminate in the amount of the *charges* levied against shippers. In its 1949 report the Maritime Commission noted:

> The most common abuses arise from the forwarders' methods of billing—the failure to specify clearly and state separately all service charges, and to segregate them from actual out-of-pocket costs for accessorial services • • • This practice is unjust and unreasonable. *Port of New York Freight Forwarder Investigation*, 3 U. S. M. C. 157, 163 (1949).

In 1961 the agency again concluded that markups "are imposed in a random fashion, vary from shipper to shipper

and from shipment to shipment, and appear to bear no relation to the cost to the forwarder for his services of placing the insurance." *Investigation of Practices, Operations, Actions, and Agreemnets of Ocean Freight Forwarders,* 6 F. M. B. 327, 340-41 (1961). The Maritime Commission properly relied on these earlier findings in drafting Section 510.23(j). The agency's rule-making process is not conducted in an isolated vacuum but is a continuing one; evidence gathered in the past, so long as it is still relevant, may be useful in exploring solutions to present problems.

The forwarders argue that a Section 16 (First) violation is shown only when (1) two shippers are given unequal treatment, (2) the shippers are competitors, and (3) the preference to one or disadvantage to the other is the proximate cause of an injury; these prerequisites, they urge, are not supported by the Commission's record. We hold, however, that the substantial evidence that forwarders, in random fashion, charge shippers disguised markups of widely varying amounts, for no apparent reason, suffices to establish discrimination in violation of Section 16 (First). In urging that all three prerequisites must be met, the forwarders rely upon cases involving alleged discrimination in transportation or wharfage charges. See, e.g., Agreement 8765-Gulf/Mediterranean Trade, 7 F. M. C. 495 (1963); Wharfage Charges and Practices at Boston, Mass., 2 U. S. M. C. 245 (1940). We find those cases not apposite. Transportation or wharfage charges are dependent upon the particular commodity involved; the cost for shipping or storing bananas, for example, bears no relation to the fees levied for heavy industrial equipment. To find an unlawful discrimination in transportation charges thus quite properly requires a showing of competitive relationship between two shippers who are charged different prices. But forwarders render substantially the same service to all shippers in procuring insurance or arranging for cartage; the commodity being shipped has little or nothing to do with

the reasonableness of the fee exacted for the forwarder's service. The very practice of charging shippers disguised markups of widely varying amounts on substantially identical services, without justification, seems to us to be prima facie discriminatory in a regulated industry. In any event, we do not believe competitive relationships must be shown to justify the prophylactic disclosure technique of Rule 510.23(j).

The New York Association argues that the proposed rule will not eliminate the supposed discrimination involved in assessing different charges for the same accessorial work. Requiring a forwarder to disclose his gross profit will not by itself, they urge, serve to prevent undue discrimination between similarly situated competitive shippers. But we cannot override the Commission's expert judgment that an informed shipping public will upon learning the factual details eliminate the discriminatory and unfair practices resulting from hidden charges for accessorial services. Our role as judges is limited to weighing the reasonableness of the experts' chosen means to eliminate a statutory violation.

Finally, the National Customs Brokers urge that the Commission should have adopted a more limited regulation requiring the forwarder to inform the shipper of the insured value, the insurance rate charged, and the fact that the forwarder may have charged the shipper for insurance at a rate over the forwarder's own cost. This proposed modification would not require the forwarder to disclose his premium cost when he has utilized his own open policy. But the seeming reasonableness of the Custom Brokers' proposal does not establish the unreasonableness of the Maritime Commission's regulation.

We therefore hold that the itemized billing requirement of Section 510.23(j) is reasonable and necessary to prevent discriminatory practices violative of Section 16 (First) of the Shipping Act.

D. *Section 510.24(e)*

A licensed forwarder is required by this rule to certify to the carrier on each shipment for which compensation is claimed that he has solicited and secured the cargo, or booked it or arranged its space, and has performed at least two of the additional services enumerated in Section 44(e). The specificity required by the rule is intended to eliminate "automatic" collection of brokerage payments and to permit the carrier to determine the value of the section 44 services actually rendered.

The New York Association prefers the present practice whereby a forwarder, to obtain compensation from a carrier, furnishes one invoice and one certificate covering all shipments a forwarder handles on a single vessel. The Association advocates a single, general certification which does not particularize the forwarder's services and may be used to cover an unlimited number of shipments. But the specific section 44 services performed by the forwarder will vary from shipment to shipment; a single, blanket certification for each voyage will reveal no more than a certification covering all shipments for a given month or even year. The Commission's proposed regulation is fully supported by Section 44(e)'s requirement that a forwarder certify that "he performed the above specified services *with respect to such shipment.*" (Emphasis added.)

Nor can we accept the Association's suggestion that the regulation will necessarily result in a "mountain of paper work." Only occasionally will additional documents be required—often the forwarder will be able to certify his claim on existing documents, such as a bill of lading.

Finally, the Association doubts that the check-off provisions will serve a useful regulatory purpose. It notes that if the Maritime Commission suspects that a certification is false, it will still be necessary to call upon the forwarder to demonstrate that the minimum services required by the statute have been performed. Of course, investigation will

still be required, but the very purpose of the proposed rule is to narrow the inquiry to whether the checked-off services were performed with respect to a particular shipment and to ease the difficulties in ascertaining a certification's conformity with the actual facts. A single or blanket certificate covering many shipments would make supervision difficult and invite evasion; we therefore hold that Section 510.24(e) represents a reasonable exercise of the Maritime Commission's enforcement authority.

E. *Section 510.24(g)*

This rule provides that no forwarder, or person owned or controlled by such forwarder, may collect brokerage from an ocean carrier unless it has performed the statutorily enumerated services. When the original version of the rule was amended to exclude brokerage commissions on bulk cargo, all petitioners withdrew their objections except Farrell Shipping Co., Inc. and Farrell Bros. Brokerage, Inc.

The rule seeks to avoid wholesale evasion of Section 44(e) of the Shipping Act. That section is intended to avoid the evil of commission payments by carriers to forwarders where the forwarder has performed little or no service in connection with a shipment. It therefore provides as we have already indicated, that a common carrier by water may compensate an ocean freight forwarder "when and only when" the freight forwarder certifies that he is licensed and "has performed with respect to such shipment the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo," and at least two out of five additionally enumerated services. If licensed forwarders, or their alter egos, can collect brokerage commissions without certifying performance of the requisite number of services under section 44(e) simply by claiming they are acting as ocean freight brokers, sec-

tion 44(e) will stand devoid of meaning. Rule 510.24(g) is, therefore, necessary to prevent a freight forwarder's alter ego from claiming brokerage as a freight broker whenever the forwarder itself cannot complete a section 44(e) certificate because the requisite services have not been performed. The rule does not regulate independent brokers, who are concededly not subject to regulation, but only limits a licensee's affiliations in order to prevent circumvention of the 1961 Act's limitations on the receipt of brokerage payments. See *American Union Transport, Inc.* v. *United States*, 257 F. 2d 607, 612 (D. C. Cir. 1958), *cert. denied*, 358 U. S. 828 (1959).

The challenged regulation directly affects the Farrell operation. Farrell Shipping Co. was registered with the Maritime Commission as a freight forwarder before the enactment of the 1961 Law. After that law was passed, Farrell Bros. Brokerage was incorporated to engage primarily in export freight brokerage and chartering brokerage activities. The two companies have common owners and occupy adjacent office facilities. But even if we accept Farrell's contention that Farrell Brokerage never charges a carrier a brokerage fee on cargo for which Shipping has acted as a freight forwarder, Rule 510.24(g) must be upheld. Regulations are not directed at the practices of a single corporation, nor are they vitiated by the fact that in attempting to curtail illegal activity by some persons limitations are also placed on assumedly legitimate activities of others. Rule 510.24(g) represents a reasonable and necessary effort to prevent those freight forwarders who are unable to give the certificate required by section 44(e) from charging ocean common carriers for an incomplete forwarding service by calling it a brokerage service.

We do not overlook Farrell's contention that it would have been more reasonable to require a broker to furnish a written statement under oath specifying the brokerage services performed and attesting that the brokerage charge is

not made to avoid compliance with section 44(c). But we cannot reject the Commission's implicit determination that it would be too difficult, under such a rule, to regulate freight forwarders if their owners are permitted to operate separate businesses that charge for brokerage services. We, therefore, hold that Rule 510.24(g) is reasonable and necessary to insure that freight forwarders are compensated by ocean carriers only when the requisite section 44(c) services have been performed.

F. *Section 510.25(a)*

If this rule is upheld, forwarders will be required upon reasonable request, to disclose to Maritime Commission personnel or bona fide shippers *special contracts or arrangements* with shippers. The object is to assure nondiscriminatory treatment by freight forwarders to similarly situated shippers seeking "special contracts." We need not agree with the Commission that "the best way to assure nondiscriminatory treatment is to allow shippers to determine the rates at which freight forwarder services are being performed under special contracts for persons similarly situated." F. M. C. No. 973, Denial of Petitions for Reconsideration, p. 7. It is sufficient that we find the rule a reasonable vehicle for enforcing compliance with Section 16's prohibition against a forwarder "unduly or unreasonably preferring or discriminating against" any person.

We cannot accept the New York Association's argument that the regulation is unlawful because it requires disclosure of a confidential relationship and compels the forwarder to reveal information to a third party in violation of Section 20 of the Shipping Act, 46 U. S. C. § 819. Section 20 makes it unlawful for any forwarder to disclose without the consent of his shipper any information concerning the nature, quantity, destination, consignee or routing of any shipment which may be used to the shipper's detri-

ment or improperly disclose his business transactions to a competitor. Because the term "special contract," as defined in Section 510.21(j), is directed to the financial arrangements which may exist between forwarder and shipper, such as lump sum charges or monthly retainers, we cannot see how Section 510.25(a) will cause disclosure of the confidential business details mentioned in Section 20. Moreover, a forwarder's charges for his services can never be "confidential," given the public nature of his already carefully regulated calling. *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33 (1917).

Finally, we note that the challenged regulation merely replaces one that required forwarders to "advise" shippers of the terms under which they made "special contracts or agreements" available to other shippers. General Order 72, 15 Fed. Reg. 3153, §§ 244.9, 244.10 (1950). We are persuaded that this minor change is reasonable and necessary to effectuate the anti-discrimination provisions of the Shipping Act.

We conclude that the six challenged regulations are reasonable and necessary to implement the policy and objectives of the 1916 Shipping Act and the 1961 Freight Forwarder Law. The regulations are not in excess of the authority conferred by both statutes. We therefore affirm the Commission's order promulgating the regulations.

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of October, one thousand nine hundred and sixty-four.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSN., INC., INGE AND CO., INC., BARR SHIPPING CO., INC., MAJOR FORWARDING CO., INC., and JOHN H. FAUNCE, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,
Respondents,

PHILADELPHIA FREIGHT BROKERS, FORWARDERS AND CUSTOM BROKERS and FORWARDERS ASSN., INC., BALTIMORE CUSTOMHOUSE BROKERS AND FORWARDERS ASSN., FOREIGN COMMERCE CLUB OF BOSTON, INC., and EXPORT AND IMPORT FORWARDING ASSOCIATION OF VIRGINIA,
Intervenors.

Petition for review of an order of the Federal Maritime Commission.

Judgment of the United States Court of Appeals

This cause came on to be heard on the transcript of the record from the Federal Maritime Commission and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of the Federal Maritime Commission be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

APPENDIX C

Denial of Petitions for Rehearing In Banc

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC., ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA AND FEDERAL MARITIME COMMISSION,

Respondents.

—o—

Haight, Gardner, Poor & Havens, New York, N. Y., for Petitioner National Customs Brokers & Forwarders Association of America, Inc.

Gerald H. Ullman, New York, N. Y., for Petitioner New York Foreign Freight Forwarders and Brokers Association, Inc. and Members Thereof.

Hogan & Hartson, Washington, D. C., for Petitioners Farrell Shipping Co., Inc. and Farrell Bros. Brokerage, Inc.

Denial of Petitions for Rehearing In Banc

No active circuit judge having requested that the case be reheard in banc, the petitions are denied.

J. Edward Lumbard
Chief Judge

Petitions for Rehearing Denied.
Motions for a Stay of Mandate Granted.

LPM JJS IRK
U.S.C.JJ

Nov. 12, 1964

APPENDIX D

Report of Federal Maritime Commission Denying Petitions For Reconsideration in Docket No. 973 (2 SRR 735)

FEDERAL MARITIME COMMISSION

No. 973

PRACTICES OF LICENSED INDEPENDENT OCEAN FREIGHT, OCEAN FREIGHT BROKERS, AND OCEANGOING COMMON CARRIERS

DENIAL OF PETITIONS FOR RECONSIDERATION

By order dated April 2, 1963, the Commission adopted rules in this proceeding to become effective June 1, 1963. Petitions to reconsider certain of the adopted rules and to postpone the effective date of the rules pending reconsideration were filed on May 13, 1963, by the National Custom Brokers and Forwarders Association of America, Inc. (National Association), on May 20, 1963, by Farrell Shipping, Inc. and Farrell Bros. Brokerage, Inc. (Farrell), and on May 20, 1963, by the New York Foreign and Freight Forwarders Brokers Association, Inc. (New York Association). The petition of the National Association relates only to rule 510.23(j), the petition of Farrell relates only to rule 510.24(g) and the petition of the New York Association relates to rules 510.21(l), 510.22(a), 510.23(j), 510.24(g), 510.24(h), and 510.25.

The Commission hereby denies each of the motions because it has already considered the substance of the arguments presented in each of the petitions and believes the rules are based upon sound reasons. The reasons for adop-

tions of each of the rules to which the petitions are directed are stated below:

RULE 510.21(l).

The purpose of rule 510.21(l) is to define the term "beneficial interest" as used in the following section of Public Law 87-254:

> "An 'independent ocean freight forwarder' is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest."

We think it clear that the term "beneficial interest" as used in this statute includes persons who finance shipments. A predecessor bill (S. 1368, 87th Cong., 1st sess.) defined "an independent ocean freight forwarder" as "a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein other than a lien." A representative of the Federal Maritime Board testified as follows:

> "H. R. 2488 defines 'independent ocean freight forwarder' so as to exclude any person having a beneficial interest, other than a lien in a shipment being dispatched. A lien on a shipment could give a freight forwarder sufficient beneficial interest in the shipment to cause payments thereon by the carrier to the forwarder to be a form of indirect rebate of the freight. It is therefore recommended that the

> words 'other than a lien' be deleted from line 7 page 2 of the bill."[1]

The phrase "other than a lien" was deleted "in agreement with the Commerce Department's position that a lien on a shipment could give a freight forwarder sufficient beneficial interest in the shipment to cause payments thereon by the carrier to the forwarder to be a form of indirect rebate of the freight." (Senate Rept. No. 691, 87th Cong., 1st sess., page 4). We think this makes it clear that Congress intended that a lien interest should constitute a beneficial interest. Rule 510.21(l) specifies, in part,

> "that any obligation arising in favor of a licensee by reason of advances of out-of-pocket expenses incurred in dispatching of shipments shall not be deemed a beneficial interest."

We do not think that Congress intended that liens which might arise from payment of ocean freight monies should be deemed a beneficial interest because Public Law 87-254 expressly lists "payment of the ocean freight charges" as a function a freight forwarder may perform and a basis for his receipt of compensation. This is not so with respect to liens which arise from financing of the purchase of export shipments, which function is primarily that of the exporter or financial institutions and not of the independent ocean freight forwarder.

RULE 510.22(a).

The purpose of the portion of this rule to which the New York Association objects is to prevent forwarders in principal ports who may control cargo moving through out-

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[1] Hearings before the Subcommittee on Merchant Marine and Fisheries, House of Representatives, on H. R. 2488, 87th Cong., 1st Sess., page 18.

ports, from bypassing forwarders in the outports. We think it important in the development and free flow of the foreign commerce of the United States that local freight forwarders be available at outports and that their existence will be endangered if the carrier or its agent performs services at the outport for a forwarder not located there.[2] The New York Association is concerned that under this rule a forwarder who merely "requests" a carrier to perform forwarding services may be denied compensation even though the services is not, in fact, rendered by the carrier. This is not the intention of the rule and it will not be interpreted to require that a carrier deny compensation where a forwarder requests but the carrier does not render the services requested.

RULE 510.23(j).

The purpose of this rule is to prevent freight forwarders from indiscriminately marking up insurance and accessorial services. As indicated in the Examiner's Report in Dockets No. 765/831,

> "These markups, so far as the record discloses, are imposed in a random fashion, varying from shipper to shipper and from shipment to shipment, and appear to bear no relation to the cost to the forwarder for his services of placing the insurance, despite the testimony of some forwarders that the markups represent legitimate service charges covering the work necessary to secure insurance coverage, preparation of insurance certificates, and handling of claims where necessary." (Recommended Decision in Dockets No. 765/831, pages 16-18).[3]

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[2] See Board Report in Dockets No. 765/831, pages 19-20; Examiner's Report in that Docket, pages 20-21; and Hearings on H. R. 2488, *supra*, page 56.

[3] A similar finding is made in the Report of the Federal Maritime Board in Dockets No. 765/831, pages 15-17.

The New York Forwarders claim:

> "it is our understanding that this rule requires a forwarder to state separately on his invoice to the shipper the premium cost and his service fee for arranging insurance. However, the rule is far from clear as to what the obligations of the forwarder are with respect to other accessorial services rendered, such as cartage, warehousing and recoopering.'"

The rule specifically states that "premium cost of insurance arranged" must be shown and also states that "all other charges or fees assessed by the licensee for *arranging* the services enumerated in subparagraphs (1), (2), (3), and (4) of this paragraph shall be itemized." The intent is that where a freight forwarder is the middle man who merely arranges to have the service (other than insurance) performed by another party, the charge by the freight forwarder for arranging such service shall be invoiced. Where, however, the freight forwarder provides the service to the shipper, for example, where he hires a truck to carry the freight of various shippers to the ship and charges each one a specific amount, only the charge he makes to the shipper for the cartage service (not an allocation of the freight forwarder's cost of providing the service) need be shown.

RULE 510.24(g).

The purpose of this rule is to avoid wholesale evasion of Sections 44(a) and (e) of the Shipping Act, 1916, as amended by Public Law 87-254. Section 44(e) states that a common carrier by water may compensate an ocean freight forwarder "when and only when" the freight forwarder certifies that he is licensed and

> "* * * has performed with respect to such shipment the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for

space for, such cargo, and at least two of the following services:

"(1) The coordination of the movement of the cargo to shipside;

"(2) The preparation and processing of the ocean bill of lading;

"(3) The preparation and processing of dock receipts or delivery orders;

"(4) The preparation and processing of consular documents or export declarations;

"(5) The payment of the ocean freight charges on such shipments: * * *"

Allowing ocean freight forwarders, either directly or through the device of a separate corporation, to claim brokerage in cases where they cannot make such a certification would destroy the effectiveness of this statutory provision. In effect, rule 510.24(g) is a necessary complement to Section 44(e) of the Shipping Act. Moreover, Section 44(a) of the Shipping Act 1916 states in part:

"No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license * * *."

This provision, which is the crux of the P. L. 87-254, clearly conveys the intent of Congress and the standard by which the Commission can regulate the forwarding industry. Congress concluded that the forwarding industry must be fully regulated, for not only the good of the public, but for the good of the industry as well. To adopt the philosophy that a licensed freight forwarder can carry on an unregulated business very closely related to forwarding, viz., a brokerage operation, would render the statute ineffectual. Such an operation could easily be used to defeat the very purposes Congress sought to achieve.

Report of Federal Maritime Commission Denying Petitions For Reconsideration in Docket No. 973

RULE 510.24(h).

The purpose of this rule is to prohibit payments by the vessel to both the cargo broker and the freight forwarder on the same shipment. One of the requirements under rule 44(e) for payment or collection of compensation is that the freight forwarder "has performed with respect to such shipment the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for such cargo * * *" These are basically the functions for which a broker is paid. If a vessel compensates both a freight forwarder and a broker on the same shipment, it is burdening ocean commerce with dual payments. Congress intended to prevent this as made clear in Senate Report No. 691, 87th Cong., 1st sess. The first page of the Senate Report indicates that a predecessor bill had been amended by adding the following language to the provision that was to become Section 44(e):

> "*Provided, however*, That where a common carrier by water has paid, or has incurred an obligation to pay, separate compensation to an independent ocean freight forwarder for any of the services enumerated above, such carrier shall not be obligated to pay additional compensation to any other independent ocean freight forwarder for services rendered on the same shipment."

The amendment is explained at page 3 of the Senate Report as follows:

> "A proviso added to this section would *prevent* payment of compensation to more than one forwarder on any shipment." (emphasis added.) [4]

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[4] See also page 5 of the same report which states:

"A proviso was added to the bill, to meet General Accounting Office's objection that otherwise a double charge, for both forwarding and brokerage, might be possible."

Report of Federal Maritime Commission Denying Petitions For Reconsideration in Docket No. 973

RULE 510.25.

The purpose of this rule is to assure nondiscriminatory treatment by freight forwarders to similarly situated shippers seeking "special contracts." The best way to assure nondiscriminatory treatment is to allow shippers to determine the rates at which freight forwarder services are being performed under special contracts for persons similarly situated.

IT IS ORDERED, That the petitions for reconsideration are hereby denied.

By the Commission, May 21, 1963.

THOMAS LISI,
Thomas Lisi,
Secretary.

(SEAL)

APPENDIX E

Pertinent Provisions of the Shipping Act, 1916 (46 U. S. C. § 801 et seq.)

§ 801. *Definitions*

When used in this chapter:

* * * * * *

The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

* * * * * *

An "independent ocean freight forwarder" is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest. As amended Sept. 19, 1961, Pub. L. 87-254, § 1, 75 Stat. 522.

§ 815. *Discriminatory acts prohibited.*

* * * * * *

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . . As amended Oct. 3, 1961, Pub. L. 87-346, § 6, 75 Stat. 766.

Pertinent Provisions of the Shipping Act, 1916

§ 841a. *Rules and regulations*

The Commission shall make such rules and regulations as may be necessary to carry out the provisions of this chapter. Sept. 7, 1916, c. 451, § 43, added Oct. 3, 1961, Pub. L. 87-346, § 7, 75 Stat. 766.

§ 841b. *Licensing of ocean freight forwarders-Requirement; exception*

* * * * * *

(c) The Commission shall prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders. . . . Sept. 7, 1916, c. 451, § 44, as added Sept. 19, 1961, Pub. L. 87-254, § 2, 75 Stat. 522.

APPENDIX F

Pertinent Provisions of General Order 4, Amendment 1, Subpart B (28 F. R. 4300-4302)

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[General Order 4, Amdt. 1]

PART 510—PRACTICES OF LICENSED INDEPENDENT OCEAN FREIGHT FORWARDERS, OCEAN FREIGHT BROKERS, AND OCEANGOING COMMON CARRIERS

Subpart B—Duties and Obligations

On February 24, 1962, the Commission caused to be published in the FEDERAL REGISTER (27 F.R. 1775-1776) a notice of rule making including certain proposed rules designated General Order 4, Amendment 1 (46 CFR Part 510) and invited comments thereon. After consideration of the comments received in response to that notice the Commission revised certain of the proposed rules, republished the revised proposed rules in the FEDERAL REGISTER January 3, 1963 (28 F.R. 911), and heard oral arguments on the proposed rules as revised.

The Commission has carefully considered the comments submitted and arguments on the proposed revised rules and has, pursuant to the authority of sections 43 and 44 of the Shipping Act, 1916 (75 Stat. §§ 522, 523, 766), adopted the rules hereinafter set forth.

The rules are promulgated to implement Public Law 87-254, approved September 19, 1961, and have for their purpose the establishment of standards and criteria to be observed and maintained by licensed independent ocean

freight forwarders, ocean freight brokers and oceangoing common carriers in the conduct of their business affairs.

Part 510 is hereby amended by the addition of a new subpart to Chapter IV of this title reading as follows:

Sec.

510.20 Scope
510.21 Definitions
510.22 Oceangoing common carriers and persons shipping for own account.
510.23 Duties and obligations of licensees.
510.24 Compensation and freight forwarder certifications.
510.25 Special contracts.
510.26 Section 15 agreements.
510.27 Separability.

AUTHORITY: § 510.20 to 510.27 issued under secs. 43, 44, Shipping Act, 1916 (75 Stat. 522, 523, 766); sec. 204, Merchant Marine Act, 1936 (49 Stat. 1987, as amended; 46 U. S. C. 1114).

§ 510.20 *Scope.*

This subpart pertains to the practices of licensed independent ocean freight forwarders, ocean freight brokers and oceangoing common carriers pursuant to Public Law 87-254.

§ 519.21 *Definitions.*

(a) The term "licensee" means any person licensed by the Commission as an independent ocean freight forwarder, or any independent ocean freight forwarder who, on September 19, 1961, was carrying on the business of freight forwarding under a valid registration number issued by the Commission, or its predecessors, who filed an application for such a license (Form FMC-18) on or before January 17, 1962, and whose application has not been denied.

Pertinent Provisions of General Order 4, Amdt. 1, Subpart B

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§ 510.23 *Duties and obligations of licensees.*

* * * * *

(j) Every licensee shall use invoices or other forms of billing which state separately as to each shipment: * * * (3) the insured value, insurance rate, and premium cost of insurance arranged; * * * Provided, however, that licensees who offer to the public at large to forward small shipments for uniform charges available to all and duly filed with the Federal Maritime Commission, shall not be required to itemize the components of such uniform charges on shipments as to which the charges shall have been stated to the shipper at time of shipment, and accepted by the shipper by payment; but if such licensees procure Marine Insurance to cover such shipments, they must state their total charge for such insurance, inclusive of premiums and placing feeds, separately from the aforementioned uniform charge.

* * * * *

§ 510.27 *Separability.*

The provisions of these rules are not interdependent. If any portion hereof shall be enjoined, set aside, suspended, or held invalid, the validity and enforceability of all other rules shall be unaffected thereby, and shall to the full extent practicable, remain in full force and effect unless and until it is otherwise provided by the Commission or a court of competent jurisdiction.

These rules shall become effective June 1, 1963.

By order of the Federal Maritime Commission, April 2, 1963.

THOMAS LISI,
Secretary.